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"Federal prosecutors have long followed the maxim, when in doubt, charge mail fraud."[2] The federal mail fraud statute,[3] enacted in 1872, remains one of the oldest federal criminal statutes in continuous use.[4] Mail fraud has been called the federal government's number-one weapon in the fight against crime,[5] particularly because of its ease of applicability to new fac-

1 J.D. expected 2007, University of Kentucky College of Law; B.B.A. 2004, Saint Mary's College. The author would like to thank her family for their constant love and support.

2 Paul Mogin, *Reining in the Mail Fraud Statute*, CHAMPION, at 12, 13 (May 2002) (quoting John C. Coffee & Charles V. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, *in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 9.01 (O. Obermaier & R. Morvillo eds., 1990)).

3 18 U.S.C. § 1341 (2000).

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Id.

4 Gregory H. Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

5 *Id.* ("U.S. Attorneys marvel at its ability to cover a wide range of criminal activity."); *see also* 2 SARAH N. WELLING ET. AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO 3 (1998) ("To federal prosecutors of white collar crime, the mail fraud statute is . . . our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18

tual situations.[6] The purpose of the mail fraud statute is to prevent the post office from being used to carry out fraudulent schemes.[7] Over the years, the statute has captured a variety of schemes including consumer frauds, stock frauds, land frauds, insurance frauds, commodity frauds, blackmail, counterfeiting, election fraud, and bribery.[8] Mail fraud not only can be a broad tool for the government on its own, but is also an underlying tool for the government to pursue other crimes, such as racketeering.

The Supreme Court envisioned a protective role for the statute, so the Court severed the statute from common-law fraud, holding that mail fraud reaches fraudulent representations pertaining to the past, present, and future.[9] Prosecutors have utilized that protective role to their advantage in capturing newly created frauds not yet recognized by the legislature. Although the statute captures a wide range of crimes, its malleability affords prosecutors too much discretion in determining what conduct violates the law, a role that should be left to the legislature. To curtail the reach of the mail fraud statute, federal courts have applied judicial limits to each of the elements of the crime. This Note examines the constraints placed on the statute by both the Supreme Court and several circuit courts of appeals. Part I illustrates the strength of mail fraud.[10] Part II focuses on the expansive reach of each of the elements of mail fraud and the limits applied to each of the three elements.[11] Part III explains the relief provided under the sentencing guidelines for those convicted of mail fraud.[12] Finally, Part IV addresses the need for the Supreme Court to provide further guidance

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U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity."); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 558 (1998) ("[M]ail fraud [is] a prosecutor's 'Stradivarius' or 'Colt 45.'" (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980))); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) ("[V]arious federal fraud statutes—in particular, the mail and wire fraud statutes," that "[w]ith regard to the statutory weapons available to prosecutors, they rank by analogy with hydrogen bombs on stealth aircraft.").

6 Elkan Abramowitz, *'Intent to Harm' in Federal Statute on Mail Fraud*, N.Y.L.J., at 3 (May 5, 1998).

7 Durland v. United States, 161 U.S. 306, 314 (1896); *see* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 442 (1995) ("The House sponsor of the legislation stated that the provision was designed 'to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people of the country.'" (quoting CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth))).

8 Ryan Y. Blumel, *Mail and Wire Fraud*, 42 AM. CRIM. L. REV. 677, 678 (2005).

9 *See infra* notes 14–17 and accompanying text.

10 *See infra* notes 14–35 and accompanying text.

11 *See infra* notes 36–155 and accompanying text.

12 *See infra* notes 156–68 and accompanying text.

to lower courts in restraining the mail fraud statute.[13] The Court has limited the statute in the past and should continue down that path by adopting limits in the area of the honest services doctrine.

I. The Ease of Charging Mail Fraud

In 1896, *Durland v. United States*[14] gave the Supreme Court its first opportunity to interpret the mail fraud statute. John Durland schemed to defraud bond investors by taking money on bonds he knew would not mature. Durland argued the mail fraud statute did not reach such conduct because at common law the definition of false pretenses meant there must be "misrepresentation as to some existing fact and not a mere promise as to the future."[15] Refusing to read the statute so narrowly, the Court interpreted "any scheme or artifice to defraud" to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[16] *Durland* "cut the mail fraud statute loose from its common law moorings" and set forth a broad vision of the protective function of the Act.[17] To allow the statute to serve such a protective role, the federal courts have afforded the mail fraud act a broad and flexible reading,[18] turning the statute into a "generic fraud statute."[19]

Using its constitutional power to establish post offices,[20] Congress originally enacted section 1341 to protect the establishment of the United States Post Office. Over the years, the mailing element of the statute has dissipated in importance, becoming a simple jurisdictional hook the prosecutor must prove.[21] With any federal prosecution, the government must establish federal jurisdiction, and "virtually any mailing in the course of a scheme to defraud may now trigger federal prosecution for mail fraud."[22] The ease in proving the jurisdictional element prompts prosecutors to charge mail fraud rather than other crimes. For example, mail fraud captures bribery of a public official because taking the bribe defrauds the public of the right to the official's honest services. The prosecutor could charge a public official under the Hobbs Act[23] for bribery, but then the prosecutor would

13 *See infra* notes 169–75 and accompanying text.

14 Durland v. United States, 161 U.S. 306 (1896).

15 *Id.* at 312.

16 *Id.* at 313.

17 2 Welling, *supra* note 5, at 6.

18 *Id.*

19 Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 752 (1999).

20 U.S. Const. art. I, § 8, cl. 7.

21 *See infra* notes 127–49 and accompanying text.

22 Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 Syracuse L. Rev. 1127, 1159 (1997).

23 18 U.S.C. § 1951 (2000).

have to prove federal jurisdiction through either the defendant's effect on commerce in the individual case or movement of an article through commerce.[24]

Because of the simplicity of proof required in establishing mail fraud, the Act "is the government's most commonly used predicate act" to a charge of racketeering.[25] Under 18 U.S.C. § 1962, "it is unlawful for any person" to receive income "from a pattern of racketeering."[26] Racketeering activity includes any act that is indictable under mail fraud[27] and a pattern of racketeering activity requires just two acts of racketeering activity.[28] These two acts can easily be reached when the predicate act is mail fraud because *each* mailing in furtherance of a scheme to defraud is a separate offense under section 1341, and therefore each separate act of mail fraud is an act of racketeering.[29] Ellen Podgor, a law professor who studies mail fraud, described the benefit of the elasticity of the mail fraud statute in combination with RICO and tax offenses:

> Unlike mail fraud, tax offenses are not included as predicate acts for a RICO charge. Therefore, by calling the fraudulently filed returns mail fraud as opposed to tax fraud, the prosecution accomplishes penalty enhancement for an offense that Congress never even considered during the enactment of the statutory crimes of mail fraud or RICO.[30]

The breadth of mail fraud also allows prosecutors and courts to fill gaps in the current criminal law and capture undefined crimes.[31] "When a 'new' fraud develops, the mail fraud statute becomes a stopgap device" to prosecute the new fraud until new legislation can be passed to deal directly with the fraud.[32] While such adaptability allows prosecutors to go after new forms of fraud, it should be legislatures and not courts defining criminal

24 *Id.* ("[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce")

25 Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 263–64 (1992).

26 18 U.S.C. § 1962(a) (2000).

27 *Id.* § 1961(1)(B).

28 *Id.* § 1961(5).

29 United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978).

30 Podgor, *supra* note 25, at 266.

31 Todd E. Molz, Comment, *The Mail Fraud Statute: An Argument for Repeal by Implication*, 64 U. CHI. L. REV. 983, 985 (1997) ("Such gapfilling is good when the illicit activity is a new form of fraud that Congress has yet to consider. For example, before Congress passed the credit card fraud statute, prosecutors and courts used the mail fraud statute to prosecute such fraud.").

32 United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, J., dissenting); *see also* Molz, *supra* note 31, at 985 ("To define the limits of mail fraud, however, would destroy the statute's ability to adapt and thereby capture new forms of fraud.").

activity.[33] While the statute serves as a catchall devise which covers crimes not yet recognized by the legislature, this strength affords prosecutors too much discretion and fails to give adequate notice of what type of conduct the statute covers.[34] Further, prosecutors use the mail fraud statute despite the existence of particularized legislation, thus using the statute as a "bad" gapfiller and undermining congressional intent.[35] As a result, courts have begun to focus on the abuse of the mail fraud statute.

II. JUDICIAL LIMITS

The courts have attempted to reduce the infinite reach of the mail fraud statute through judicial limits. To convict a defendant of mail fraud, the government must show that the defendant (1) formed a scheme to defraud (2) with the intent to defraud (3) while using the United States Postal Service or a private interstate commercial carrier in furtherance of that scheme.[36] The "scheme . . . to defraud"[37] does not have to be successful,[38] and includes schemes to deprive someone of both property[39] and honest

33 *See* United States v. Bass, 404 U.S. 336, 348 (1971).

34 Gregory D. Jones, Note, *Primum Non Nocere: The Expanding "Honest Services" Mail Fraud Statute and the Physician-Patient Fiduciary Relationship*, 51 VAND. L. REV. 139, 146 n.26 (1998).

35 *See* Podgor, *supra* note 5; *see also* Molz, *supra* note 31. One court recognized this problem and held that mail fraud was preempted by a more specific tax fraud statute. *Id.* at 991.

36 18 U.S.C. § 1341 (2000); *see* United States v. Akpan, 407 F.3d 360, 370 (5th Cir. 2005) ("To prove a mail fraud violation under § 1341, the government must establish: (1) a scheme to defraud; (2) use of the mails to execute the scheme; and (3) the specific intent to defraud. Each separate use of the mails to further a scheme to defraud is a separate offense." (citations omitted)); United States v. Holmes, 406 F.3d 337, 353–54 (5th Cir. 2005) ("To prove mail fraud under § 1341, the government must show (1) a scheme to defraud; (2) the use of the mails to execute the scheme; and (3) the specific intent to defraud. In addition, the Supreme Court has interpreted § 1341 to require that the misstatement made in the course of the scheme to defraud be a material one." (citations omitted)); Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004) ("To allege a violation of mail fraud under § 1341, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud" (citations omitted)); Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004) ("The essential elements of a mail fraud violation are (1) a scheme to defraud, (2) money or property [as the object of the scheme], and (3) use of the mails to further the scheme" (citations omitted)); United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) ("To prove mail and wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme.").

37 18 U.S.C. § 1341 (2000).

38 *See* Durland v. United States, 161 U.S. 306, 313–14 (1896).

39 *Id.* § 1341 ("obtaining money or property").

services.[40] The Supreme Court and the circuit courts have applied limits to each of these elements, with deprivation of honest services remaining the largest area courts have attempted to restrict.

A. Scheme to Defraud

1. Deprivation of Honest Services.—The doctrine of the deprivation of honest and faithful service developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage and thus deprive his constituents of their right to have him perform his duties in their best interest.[41] For instance, when the official decides how to vote on an issue, his constituents have a right to have their best interests form the basis of that decision, but if the official instead secretly makes the decision based on his own personal interest (when he takes a bribe or benefits from a conflict of interest), "the official has defrauded the public of his honest services."[42] The honest services doctrine has been applied to government officials who defraud the public of the official's honest services, elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election,[43] "and private persons who abuse fiduciary duties by taking bribes."[44]

In *McNally v. United States*,[45] the Supreme Court ended (for a very brief period of time) mail fraud actions under the honest services doctrine. Rather than interpreting the mail fraud statute in a manner that left its outer boundaries ambiguous, the Supreme Court held that the statute protects only property rights and not the right to honest services.[46] *McNally* appears to have been decided largely on the basis of separation of powers considerations: "[c]ourts are not free to expand criminal liability for fraud

40 18 U.S.C. § 1346 (2000) ("the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services").

41 *See* United States v. Frost, 125 F.3d 346, 365 (6th Cir. 1997); United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997).

42 *Lopez-Lukis*, 102 F.3d at 1169.

43 The Sixth Circuit has recently interpreted the honest services definition more narrowly, finding "the plain terms of [§ 1346], the Supreme Court's discussion of the statute in *Cleveland* and the legislative history of the statute all demonstrate that Congressional enactment of §1346 did not revive those cases involving prosecutions under the mail fraud statute for deprivations of the intangible right of honest elections." United States v. Turner, 465 F.3d 667, 674 (6th Cir. 2006). Instead, the right to honest elections is separate and distinct from the right to honest services. *Id.* at 673.

44 United States v. Rybicki, 354 F.3d 124, 133 (2d Cir. 2003).

45 McNally v. United States, 483 U.S. 350 (1987).

46 *Id.* at 360 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.").

beyond the clear statement of Congress."[47] The Court stated that if Congress wanted to extend mail fraud to deprivation of honest services, it had to speak more clearly.[48] Congress took less than a year to respond to the Supreme Court's invitation. Congress overturned the Court's elimination of the honest services doctrine by passing 18 U.S.C. § 1346[49] with the intention of reinstating all the pre-*McNally* case law pertaining to the mail fraud statute without change.[50] This allowed the continued expansion of the vague right to honest services, particularly because the statute failed to define what the right to honest services includes.[51]

Although failure to define honest services has created plausible arguments that section 1346 is unconstitutionally vague, courts have failed to invalidate section 1346 for its lack of definition. A statute may be vague if it fails to provide notice that would enable ordinary individuals to understand the conduct that is prohibited or if it authorizes arbitrary and discriminatory enforcement.[52] Prior to *McNally*, there were numerous prosecutions of deprivation of honest services. Courts find these cases describe the "criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," so courts do not believe the potential reach of section 1346 is virtually limitless as to encourage arbitrary enforcement.[53] Nevertheless, the limitless expansion of the mail fraud statute opens the door for abuse through "selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors."[54] Prosecutors may have careerist motives to stalk the "big kill," "typically a highly visible business or political figure, even if the evidence ultimately obtained shows misconduct that is relatively modest in proportion to other violations by less notable persons."[55] Although courts are not willing to strike down the statute completely due to vagueness, they do confine the statute through judicially applied limits.

By adding an extra element of a violation of state law, the Fifth Circuit Court of Appeals took a major step towards limiting the honest services doctrine. In *United States v. Brumley*, the court held that in addition to proving a scheme to defraud and use of the mails in furtherance of the scheme, the government must also show that the honest services are owed under

47 *Rybicki*, 354 F.3d at 134.

48 *McNally*, 483 U.S. at 360.

49 18 U.S.C. § 1346 (2000).

50 134 CONG. REC. S17, 360–02 (daily ed. Nov. 10, 1988).

51 *See* Henning, *supra* note 7, at 464–66.

52 *Rybicki*, 354 U.S. at 134.

53 *Id.* at 142.

54 United States v. Margiotta, 688 F.2d 108, 143 (2d. Cir. 1982) (Winter, J., dissenting).

55 John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 21 (1983).

an existing state law and that they were in fact not provided.[56] Reliance on state law prevents the federal government from imposing upon states a federal vision of appropriate services owed to others when such rights and duties can be located under state law.[57] Alleging that services were not done honestly does not allege a violation of mail fraud "if the official does all that is required under state law."[58] The court feared to hold otherwise would bring "almost any illegal act within the province of the mail fraud statute."[59]

Brumley placed boundaries on the federal government's ability to define good government, but the opinion was not without criticism. The dissenting judges took issue with the court assuming "a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute."[60] While *Brumley* may stretch beyond a judicial opinion, the court's new requirement was a step in the right direction towards limiting an ever-expanding statute. The Third Circuit Court of Appeals endorsed the Fifth Circuit's stringent interpretation of section 1346 and now also requires "a state law limiting principle for honest services fraud."[61]

The First Circuit Court of Appeals requires a clear violation of federal law by state government employees,[62] as opposed to state law as discussed above. The court found the need for some limit because "[t]o allow every [wrongdoing] of state governmental obligations to amount to mail fraud would effectively turn every [wrongdoing] into a federal felony."[63] The opinion made clear that a mere violation of a state ethics law does not "suffice to establish the intent to deprive the citizenry of the 'honest services' of a government official," and thus the violation cannot establish a violation of the mail fraud statute.[64] The court requires more to support a mail fraud

56 United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997). *But see* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 446–47 (1998) (*Brumley* leaves open the question of whether section 1346 requires a criminal offense under the relevant state law (as was the case in Brumley), or merely a violation of state common law norms); Daniel W. Hurson, Comment, *Mail Fraud, The Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 HOUS. L. REV. 297, 320 (2001) ("[W]ithin the Fifth Circuit, there may no longer be uniformity in federal mail fraud law. Indeed, one could enter Texas, Louisiana, and Mississippi all on a given day and, depending on the duties owed according to the laws of each state, engage in activity that could be subject to mail fraud prosecution in one state while being insulated from prosecution in a neighboring state.").

57 *Brumley*, 116 F.3d at 734.

58 *Id.*

59 *Id.*

60 *Id.* at 736 (Jolly & DeMoss, JJ., dissenting).

61 United States v. Murphy, 323 F.3d 102, 116 (3d Cir. 2003).

62 *See* United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996).

63 *Id.* at 728.

64 United States v. Goldberg, 928 F. Supp. 89, 94 (D. Mass. 1996).

conviction under section 1346, such as proof of the defendant's fraudulent intent[65] or the defendant's contemplation of some actual harm or injury.[66]

The Seventh Circuit Court of Appeals took a different approach in interpreting section 1346. In *McNally*, the Supreme Court stated "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud."[67] The Seventh Circuit has held that through the enactment of section 1346, Congress intended to reinstate the *McNally* definition.[68] Thus, a public employee's misuse of his position for private gain is an essential element of an honest services prosecution.[69] Criminal fraud does not exist merely because the public official breaches his fiduciary duty.[70]

Application of the honest services doctrine in the private sector is troubling to courts.[71] In the public sector, "citizens elect a public official to act for the common good," and when the office is corrupted by bribes and kickbacks, "the essence of the political contract is violated."[72] But enforcement of the intangible right to honest services in the private sector has weaker justification since relationships in the private sector often rest on economic expectations rather than the abstract satisfaction of receiving a person's honest services for their own sake.[73] Courts are reluctant to deem every breach of contract or every misstatement made in the course of dealing a deprivation of the right to honest services.[74] The Seventh Circuit, in *United States v. Walters*,[75] illustrates the extremes that the honest services doctrine could reach in the private sector. The court, in questioning whether a practical joke would violate section 1341, posed the following scenario to a prosecutor:

> A mails B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation. But there is no party; the address is a vacant lot; B is the butt of a joke. The invitation came by post; the cost of the gasoline means that B is out of pocket.[76]

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65 *Sawyer*, 85 F.3d at 725.

66 *Id.*

67 McNally v. United States, 483 U.S. 350, 355 (1987).

68 United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).

69 *Id.*

70 *Id.* at 654; *see also* United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996) ("[E]very case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute.").

71 See United States v. Frost, 125 F.3d 346, 358 (6th 1997) ("[A]pplication of the 'right to honest services' doctrine to the private sector is problematic").

72 *Jain*, 93 F.3d at 441.

73 *Frost*, 125 F.3d at 365.

74 United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997).

75 United States v. Walters, 997 F.2d 1219 (7th Cir. 1993).

76 *Id.* at 1224.

The prosecutor responded that this scenario would be a violation under the federal mail fraud statute, but assured the court that "his office pledge[d] to use prosecutorial discretion wisely."[77] Although practical jokes do not routinely come to the attention of prosecutors, discretion to prosecute under a serious federal criminal statute for such a minor infraction indicates the broad nature of section 1341 when coupled with section 1346.[78]

The lower courts have created a variety of ways to limit the honest services doctrine in the private sector. In order to avoid the over-criminalization of private relationships, the Sixth Circuit Court of Appeals requires a breach of a fiduciary duty owed under federal law.[79] The private individual commits mail fraud by breaching his fiduciary duty and thereby depriving another person or entity of the duty of honest services owed by that individual.[80] Not only must the prosecution prove there was such a breach of a fiduciary duty, the government must also prove that "the defendant intended to breach his fiduciary duty and [should have reasonably] foreseen that the breach would create an identifiable economic risk to the victim."[81]

The Second Circuit Court of Appeals concluded that section 1346 prohibits a scheme to use the mails to enable an employee of a private entity purporting to act for and in the interests of his employer secretly to act in his own interests instead.[82] Typically, private-sector honest services cases fall either under the category of cases involving bribes and kickbacks or under the category of cases involving self-dealing.[83] In cases involving bribes or kickbacks, "the undisclosed [bribe] is sufficient to make out the crime."[84] However, in self-dealing cases, "the existence of a conflict of interest alone is not sufficient to do so," and there is an additional requirement that the self-dealing conduct cause, or be capable of causing, some detriment to the employer.[85] There must also be proof of a duty owed by the employee, but the Second Circuit failed to decide whether the source of the duty owed is defined by state or federal law.

Without a definition of honest services, "the potential reach of § 1346 is virtually limitless."[86] Lower courts have been left to interpret section 1346 and apply their own limits, but they are forced to make it up as they go

77 *Id.*

78 Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 728–29 (1998).

79 *See* United States v. Frost, 125 F.3d 346, 358 (6th 1997).

80 *Id.* at 366.

81 *Id.* at 369.

82 United States v. Rybicki, 354 F.3d 124 (2nd Cir. 2002).

83 *Id.* at 139.

84 *Id.* at 141.

85 *Id.*

86 *Id.* at 135.

along.[87] And although there are inconsistent limits among the circuits, lack of conformity is better than no limits at all.

2. Deprivation of Property.—Mail fraud includes schemes to defraud a person of money or property,[88] but a conviction for mail fraud does not require that the defendant obtain the money or property.[89] Not only does mail fraud encompass deprivation of tangible property, it also captures intangible property. In *Carpenter v. United States*, a *Wall Street Journal* investment advice columnist divulged information from his column to brokers before publication.[90] The brokers made large profits by trading on this advanced information and shared those profits with the columnist. The Supreme Court in *Carpenter* held that confidential business information is a property right.[91] Although the Court ultimately recognized this intangible property right, sprinkled throughout the opinion are additional justifications for recognizing such a right. The Court pointed out that the columnist was aware of the *Journal*'s confidentiality policy.[92] Additionally, the Court mentioned the fiduciary duty an employee owes to protect confidential information obtained during the course of employment.[93] In the same year as *Carpenter*, the Court had refused to recognize the intangible right to honest services in *McNally*.[94] Providing extra reasons in *Carpenter* seems to indicate the Court's hesitancy in extending property rights to the outer limit, so by defending the holding by mentioning fiduciary duties and company

87 Brief for the National Association of Criminal Defense Lawyers and the New York Association of Criminal Defense Lawyers as Amici Curiae in Support of Defendants-Appellants-Cross-Appellees, United States v. Rybicki, 354 F.3d 124 (2nd Cir. 2002) (No. 00-1043(L)), 2002 WL 33770689,

88 18 U.S.C. § 1346 (2000).

89 Porcelli v. United States, 404 F.3d 157, 162 (2d Cir. 2005).

90 Carpenter v. United States, 484 U.S. 19, 23 (1987).

91 *Id.* at 26 ("The Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the "Heard" column."); *see, e.g.*, United States v. Hedaithy, 392 F.3d 580, 594 (3d. Cir. 2004) (educational testing company had "property interest," cognizable under mail fraud statute, in keeping confidential and making exclusive use of confidential business information contained in standardized test that was administered to foreign students to measure their English proficiency, which was recognized as yardstick by colleges in their admissions process for foreign students).

92 *See Carpenter*, 484 U.S. at 23, 28. The columnist was familiar that the *Journal*'s business information which it intended to keep confidential was its property and declaration to that effect was in the employee manual.

93 *Id.* at 27 ("[A]lthough a decision grounded in the provisions of a written trust agreement prohibiting the unapproved use of confidential Government information, we noted the similar prohibitions of the common law, that even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.").

94 McNally v. United States, 483 U.S. 350 (1987).

policy, the Court could feel more at ease in recognizing intangible property rights.

In limiting the reach of mail fraud, the Seventh Circuit clarified "deprivation of property" in *United States v. Walters*.[95] *Walters* involved an indictment of an agent who signed agency contracts with college athletes still playing for their colleges. The government argued the defendant deprived the university of money because the university contributed scholarship funds to these athletes who had become ineligible as a result of the agency contracts.[96] In actuality, however, it was the players who deprived the university of the funds and not the agent. The court held that only a scheme to obtain money or other property *from the victim* by fraud violates section 1341, emphasizing that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."[97] The agent did not deprive the college of scholarship funds when he had no connection with the college.

The Supreme Court weighed in on the definition of property after *Carpenter*. Following Congress's quick reaction to *McNally* by creating legislation expanding the definition of mail fraud to include honest services,[98] "the Court largely left § 1341 alone for the next decade."[99] In 2000, the Court in *Cleveland v. United States* held that permits and licenses do not qualify as property under section 1341.[100] The Supreme Court narrowed the scope of the statute and clarified that the object of the fraud must be property in the hands of the victim.[101] The Court addressed the ambiguity of the word property and declared that the ambiguity in a criminal statute should be resolved in favor of lenity.[102]

Because the Supreme Court issued a blow in *Cleveland* to the definition of property, the issue of what constituted property took center stage in subsequent court opinions interpreting the case. Yet it seems the courts missed another major statement contained within the *Cleveland* opinion. The Supreme Court looked back at its interpretation of the mail fraud statute in *McNally*. Focusing on the beginning of section 1346, which reads "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,"[103] the Supreme Court reiterated

95 United States v. Walters, 997 F.2d 1219 (7th Cir. 1993).

96 *Id.* at 1221.

97 *Id.* at 1227.

98 *See supra* notes 45–50 and accompanying text.

99 Mogin, *supra* note 2, at 13.

100 Cleveland v. United States, 531 U.S. 12, 15 (2000).

101 *See id.* at 20 ("Whatever interest Louisiana might be said to have in its video poker licenses, the State's core concern is regulatory.").

102 *Id.* at 25.

103 18 U.S.C. § 1341 (2000).

its past holding by rejecting the idea that the two phrases in the statute identifying the scheme could be read independently. The second phrase of the statute merely modifies the first rather than creating a separate offense, and "any benefit the government derives from the statute must be limited to *the Government's interests as a property holder*."[104]

As already discussed, *McNally* rejected the honest services doctrine and rested on the concern of an ever-expanding mail fraud statute in the area of honest services. Congress quickly overturned this opinion, so courts have ignored the case. However, *McNally* stood for more than just a rejection of the honest services doctrine, and *Cleveland* has revived the sentiments articulated in *McNally*. Reading the two cases together, this Note concludes that the government must prove either a scheme to defraud someone of honest services or a scheme to defraud someone of money or property; a scheme just to defraud with no objective will not be prosecutable. Mail fraud, according to the Supreme Court, is limited in scope to protection of property rights and honest services.

As mentioned, many courts seem to have missed this interpretation. For example, although decided after *Cleveland*, *United States v. Chandler* interpreted the mail fraud statute to include crimes "to [devise a scheme to defraud] *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[105] The Eleventh Circuit viewed the statute's phrasing in the disjunctive, construing the statute as prohibiting two separate unlawful acts and therefore allowing two independent grounds for prosecution.[106] Conversely, the Second Circuit seems to have picked up on the Supreme Court's ruling. The Second Circuit requires the prosecution to prove "a scheme to defraud money or property as the object of the scheme."[107] It seems the rest of the circuit courts fail to construe the "money or property" requirement as a limitation on the types of schemes that are prosecutable under the statute.[108] But even if courts do recognize this distinction, courts will likely construe the definition of property liberally to capture wide varieties of fraud.

3. Materiality.—The Supreme Court further defined "scheme to defraud" in *Neder v. United States*, holding that materiality of falsehood is an element of the federal mail fraud statute.[109] The Court ruled that Congress intended to incorporate the well-settled meaning of the common-law terms, and the Court was unwilling to infer that in the absence of an express reference to materiality in the statute that Congress intended to drop that element

104 *Cleveland*, 531 U.S. at 26.

105 United States v. Chandler, 388 F.3d 796, 804 (11th Cir. 2004) (emphasis added).

106 *Id.*

107 Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004).

108 *Id.*

109 Neder v. United States, 527 U.S. 1, 25 (1999).

from the fraud statutes.[110] Materiality limits the extent to which conduct may be prosecuted.

B. With the Intent to Defraud

One must possess the specific intent to deceive or defraud in order to commit mail fraud.[111] Some courts, however, have ignored this requirement by holding the statute reaches material misrepresentations made with a reckless disregard for the truth.[112] Because of the difficulty in directly proving the defendant's state of mind, the element is usually inferred from a variety of circumstantial evidence.[113] Intent may be inferred from evidence that the defendant attempted to conceal activity, from evidence of the defendant's misrepresentations, from the defendant's knowledge of a false statement, or from conversion of property by the defendant to his own use.[114] Since the statute focuses on criminalizing the use of mail in furtherance of a scheme to defraud, there is no requirement that the scheme succeed. This means the prosecution bears no burden in proving loss to a victim or gain by the defendant.[115] However, fraudulent intent may be inferred where actual harm exists as a natural and probable result of a scheme.[116]

Regardless of how fraud is shown, the fact remains the government must prove intent existed. In the absence of actual or potential harm from the scheme, the government must present evidence independent of the scheme to show fraudulent intent toward the victims.[117] In other words, the government must show that the schemer contemplated some actual harm or injury.[118] "By holding the government to a strict standard of proof on the mens rea element of the crime of mail fraud, courts have limited

110 *Id.* at 23.

111 United States v. Frost, 125 F.3d 346, 358 (6th Cir. 1997). However, the government does not need to prove that the defendant had intent to break the law. *See* United States v. Wicker, 80 F.3d 263, 267 (8th Cir. 1996).

112 United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995) ("Proof of specific intent is required, which may be found from a material misstatement of fact made with reckless disregard for the truth.").

113 *See* United States v. Smith, 133 F.3d 737, 743 (10th Cir. 1997).

114 *See* United States v. Prows, 118 F.3d 686, 692 (10th Cir. 1997); United States v. Sokolow, 91 F.3d 396, 407 (3d Cir. 1996).

115 WELLING, *supra* note 5, at 16.

116 United States v. Cochran, 109 F.3d 660, 668 (10th Cir. 1997).

117 *Id.*

118 United States v. Jain, 93 F.3d 436, 441 (8th Cir. 1996) ("Essential to a scheme to defraud is fraudulent intent . . . . The scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the government must show that some actual harm or injury was contemplated by the schemer" (quoting United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994))); *D'Amato*, 39 F.3d at 1257.

the application of the statute."[119] *United States v. Jain*,[120] a case decided by the Eighth Circuit Court of Appeals, illustrates how the requirement of intent narrows the scope of mail fraud. The government presented strong evidence of a patient referral kickback scheme; however, there was no evidence of tangible harm to any of the doctor's patients.[121] Since no actual harm occurred to the patients, the government needed to "produce evidence independent of the alleged scheme to show the defendant's fraudulent intent."[122] No such evidence existed because Dr. Jain provided his patients with the highest quality psychological services.[123] Failure to show intent allowed Jain to avoid liability for mail fraud.

A defendant may also avoid liability through the defense of good faith. Good faith constitutes a complete defense to a charge of mail fraud since there is an absence of intent.[124] A person cannot have the requisite intent to defraud if he believes the information provided in the mailing is true.[125] If John Durland, the defendant in the Supreme Court's first case interpreting mail fraud, had entered in good faith upon his business and believed that it could make enough to justify the promised returns on the bonds, then his conviction could not have been sustained.[126] This defense potentially limits the zealous prosecutor from pursuing absurd cases.

C. Using the Mail in Furtherance of the Scheme to Defraud

When enacted in 1872, the statute was designed to protect the United States Post Office from being used to carry out fraudulent schemes.[127] Mail fraud does not reach all frauds, but only those limited instances in which the use of the mails is part of the execution of the fraud.[128] But now the breadth of the mailing element has reduced the element to nothing but a jurisdictional hook, and the statute has become a generic fraud statute.

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119 Podgor, *supra* note 5, at 586.

120 *Jain*, 93 F.3d at 436.

121 *Id.* at 439.

122 *Id.* at 442 (quoting *D'Amato*, 39 F.3d at 1257).

123 *Id.*

124 United States v. Dunn, 961 F.2d 648, 650 (7th Cir. 1992).

125 United States v. Alkins, 925 F.2d 541, 549–50 (2d Cir. 1991).

126 Durland v. United States, 161 U.S. 306, 313–14 (1896).

127 *See id.* at 313; *see also* Moohr, *supra* note 22, at 1150.

128 United States v. Frost, 125 F.3d 346, 358 (6th Cir. 1997); *see* 18 U.S.C. § 1341 (2000) ("[F]or the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed.").

A conviction for mail fraud requires proof that the defendant acted with knowledge that the use of the mail would follow in the ordinary course of business or that a reasonable person would have foreseen use of the mail.[129] The mailing itself does not have to be false or fraudulent.[130] Even a routine or innocent mailing may supply the mailing element as long as it contributes to the execution of the scheme.[131] For instance, in *Carpenter v. United States* the foreseeable circulation of the *Wall Street Journal* was an essential part of the scheme to defraud the newspaper of its confidential business information.[132] Had the newspaper column not been made available to *Journal* customers through the mail, there would have been no effect on stock prices and no likelihood of profiting from the information that the defendant leaked to a broker.[133] The government does not have to establish that the defendant used the mails himself (as in *Carpenter*) or that he even intended use of the mails. Rather "the government need only prove that the scheme depended for its success in some way upon the information and documents which passed through the mail."[134] In fact, the use of the mails need not be an essential element of the scheme, but rather only incident to an essential part of the scheme.[135] While the mailing needs to be some step in the defendant's plot, a distant connection between the mailing and the scheme to defraud can suffice, as was the case in *Schmuck v. United States*.[136]

Schmuck, a used car salesman, rolled back vehicle odometers, sold the vehicles to retail dealers, and then these dealers sold the cars to unwitting customers.[137] The government argued that the retail dealers' submission of title applications in order to complete the final sale supplied the mailing element of the fraud.[138] The success of Schmuck's fraud allegedly "depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars [and their titles] from the dealers to their customers."[139] According to the Supreme Court, Schmuck's scheme did not reach fruition until the retail

129 *Frost*, 125 F.3d at 354.

130 *See* United States v. Morrow, 39 F.3d 1228, 1237 (1st Cir. 1994) (finding the defendant guilty of mail fraud even though the mailing itself was not deceptive).

131 Schmuck v. United States, 489 U.S. 705, 714–15 (1989).

132 Carpenter v. United States, 484 U.S. 19, 28 (1987) (holding that the circulation of the *Wall Street Journal* column was not only anticipated but also an essential part of the scheme).

133 *Id.*; *see also* United States v. Draiman, 784 F.2d 248, 251 (7th Cir. 1986) (reasoning as long as the defendant knew that mailings were to be used in furtherance of a fraudulent scheme, it does not matter that the mailings were done in the ordinary course of business).

134 United States v. Akpan, 407 F.3d 360, 370 (5th Cir. 2005).

135 *Schmuck*, 489 U.S. at 710–11.

136 *Id.* at 705.

137 *Id.* at 707.

138 *Id.*

139 *Id.* at 711–12.

dealers resold the cars and effected transfers of title, so the Court found that the mailing was in furtherance of the scheme.[140]

The Court refocused the mailing requirement by looking at the subjective intent of the defendant. The test under *Schmuck* is "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud" (as it did in Schmuck's case).[141] "Those who use the mails to defraud proceed at their [own] peril."[142] It was of no consequence that the odometer tampering was the root of the fraud that bore no relation to the mailing of the titles by the retail dealers.[143] Justice Scalia, dissenting, criticized the breadth of the test laid out by the majority, arguing that "it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur."[144] The Court's analysis in *Schmuck* effectively reduces the mailing element to a mere jurisdictional requirement.

It is fairly easy to satisfy the mailing element in most cases.[145] Like intent, proof of mailing can be established entirely by circumstantial evidence.[146] Testimonial evidence as to customary office practice can be sufficient proof of mailing.[147] Also, in 1994, Congress enlarged the jurisdictional scope of the mail fraud statute by extending its reach to any parcel that is "sent or delivered by any private or commercial interstate carrier."[148] This amendment expanded the statute beyond the traditional view of a provision designed to protect the postal service and allows prosecutions of mail fraud absent a United States Post Office mailing.[149]

Although this element seems to have little limits left, one limit remains intact in a few circuits. Mailings made or caused to be made under the imperative command of duty imposed by state law cannot be criminal under the federal mail fraud statute.[150] The Fifth Circuit has held that legally

140 *Id.* at 712.

141 *Id.* at 715.

142 *Id.* at 715.

143 Henning, *supra* note 7, at 458.

144 *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting).

145 United States v. Hickok, 77 F.3d 992, 1003–04 (7th Cir. 1996).

146 United States v. Massey, 827 F.2d 995, 999 (5th Cir. 1987); *see also* United States v. Waymer, 55 F.3d 564, 571 (11th Cir. 1995) ("Proof of a routine practice of using the mail to accomplish a business end is sufficient to support a jury's determination that mailing occurred in a particular instance.").

147 United States v. Bowman, 783 F.2d 1192, 1197 (5th Cir. 1986).

148 18 U.S.C. § 1341 (2000).

149 *See* Henning, *supra* note 7, at 438 (explaining the expansive nature of the mail fraud statute); *see also* Podgor, *supra* note 19, at 751–52 (explaining how the mail fraud statute has become a generic fraud statute without concern for the mailing element).

150 Parr v. United States, 363 U.S. 370, 391 (1960).

required mailings can be prosecuted as mail fraud only if they contain false statements.[151] This "legal duty" exception was reaffirmed by the Third Circuit in *United States v. Cross*.[152] The mailings in *Cross* consisted of notices of dismissals, notices of conviction, and notices of favorable disposition.[153] The court agreed that the mailings were foreseeable by the defendants, but because mailing of those notices were required by law as an integral and necessary part of the court's adjudication of cases, the mailings could not be deemed to have been made "for the purpose of executing" the fraudulent scheme.[154]

The Fifth Circuit also reiterated that the government must prove the mailings relate in some way to the fraud. The court declined to endorse a broad reading of section 1341's mailing requirement and view an innocent mailing as satisfying the element of mail fraud when the government had failed to offer *any* explanation as to how the mailing furthered the scheme to defraud.[155] Most often, however, courts ignore that many of the mailings are peripheral to the fraudulent scheme.

III. Sentencing

While use of the post office no longer has a predominant role in the conviction of mail fraud, mailing still remains the focus in determining the defendant's sentence since the use of the mails is the offense the statute denounces.[156] Thus, each mailing constitutes a separate offense, or count, of mail fraud even if the mailings are part of a single scheme.[157] A defendant convicted under section 1341 will be fined and/or imprisoned not more than twenty years, and if the violation affects a financial institution, the defendant will be fined not more than $1,000,000 and/or imprisoned not more than thirty years.[158] An amendment to the mail fraud statute is currently pending to increase penalties for those engaging in mail fraud during and in relation to a presidentially declared major disaster or emergency.[159] A

151 United States v. Curry, 681 F.2d 406, 412 (5th Cir. 1982) ("Mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mailed for the purpose of executing a fraudulent scheme.").

152 United States v. Cross, 128 F.3d 145, 152 (3d Cir. 1997) ("The scope of the federal mail fraud statute is limited .... [L]egally required mailings in circumstances like those in this case cannot be deemed to have been made 'for the purpose of executing' a fraudulent scheme.").

153 *Id.* at 149–50.

154 *Id.* at 150, 152.

155 United States v. Tencer, 107 F.3d 1120, 1126 (5th Cir. 1997).

156 Cochran v. United States, 41 F.2d 193, 197 (8th Cir. 1930).

157 United States v. Gardner, 65 F.3d 82, 85 (8th Cir. 1995) ("It is not the plan or scheme that is punished, but rather each individual use of the mails in furtherance of that scheme.").

158 18 U.S.C. § 1341 (2000).

159 Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, H.R.

conviction of fraud under the amended section will carry the same penalty associated with violations that affect financial institutions.[160]

A prosecutor may try to structure an indictment and charge multiple counts of mail fraud, and therefore try to increase the length of a defendant's sentence, but even if the defendant is convicted on each count, the Sentencing Guidelines provide relief by combining offenses that are closely related.[161] The U.S. Sentencing Guidelines Manual ("U.S.S.G") section 3D1.2[162] states that all counts involving substantially the same harm shall be grouped together into a single group.[163] If the counts involve the same victim and the same act or transaction, grouping is appropriate.[164] The commentary to the guidelines lists specific examples for grouping mail fraud. If the defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme, the counts are to be grouped together, even if the mailings and telephone call oc-

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846, 110th Cong. § 4 (2007) ("Section 1341 of title 18, United States Code, is amended by inserting: 'occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency, or' after 'If the violation.'").

160 *Id.* ("Section 1341 of title 18, United States Code, is amended by inserting: 'occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency, or' after 'If the violation.'").

161 *See* United States v. Mullens, 65 F.3d 1560, 1564 (11th Cir. 1995) ("The main purpose of U.S.S.G. § 3D1.2 is 'to combine offenses involving *closely related* counts.'").

162 UNITED STATES SENTENCING GUIDELINES MANUAL § 3D1.2 (2005)

> § 3D1.2. GROUPS OF CLOSELY RELATED COUNTS
> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
> (a) When counts involve the same victim and the same act or transaction.
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.
>
> Offenses covered by the following guidelines are to be grouped under this subsection.

Id.

163 *Id.*

164 *Id.* § 3D1.2(a).

curred on different days.[165] Additionally, if the defendant is convicted of five counts of mail fraud and ten counts of wire fraud, even though the counts arise from various schemes, and each involves a monetary objective, all fifteen counts are to be grouped together.[166]

Grouping counts serves as a major limit once a defendant is convicted of mail fraud by drastically cutting the amount of time he could potentially be sentenced. Even though the grouping of counts alleviates the length of a sentence, it remains to be seen if this limit will continue to apply. Recently, the Supreme Court held that the mandatory application of the Sentencing Guidelines is unconstitutional.[167] Although the courts no longer must adhere to the Sentencing Guidelines, it is yet to be determined how far federal judges can deviate from the Guidelines.[168] Most likely this limit is still intact.

IV. Time for the Supreme Court to Step In

Although the lower courts have been trying to rein in the strength of prosecutors, there is little conformity in the limits, and many circuits continue to interpret the statute broadly.

The primary purpose of the statute, the protection of the post office, no longer serves to curb the strength of the statute. While the focus of the statute should remain on the misuse of the United States Postal Service and leave all other cases to be dealt with by the appropriate state law, it seems the mailing element has become a mere jurisdictional hook.[169] The Court's stretch in *Schmuck* indicates how easily the Court is willing to find the requisite mailing. By creating a single test focusing on the subjective intent of the defendant, the Court has "effectively eliminated the limitations on the mailing" element.[170] Further, this case seems to be the Court's final verdict on this element. In addition, Congress's inclusion of private interstate commercial carriers further increases the power of the statute. The "legal duty" exception fails to help most persons charged with mail fraud since many circuits recognize legally necessary mailings as meeting the element of using the mail.[171]

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165 *Id.* § 3D1.2, cmt. 4.

166 *Id.* § 3D1.2, cmt. 6.

167 United States v. Booker, 543 U.S. 220, 245 (2005).

168 The Supreme Court has granted certiorari to decide whether a criminal sentence that is below the guideline range is reasonable, *see* Claiborne v. United States, 127 S. Ct. 551 (2006) (mem.), and whether a sentence that is within the range is to be treated as reasonable and thus valid, *see* Rita v. United States, 127 S. Ct. 551 (2006) (mem.). Oral arguments for both cases were heard on February 20, 2007.

169 *See* Schmuck v. United States, 489 U.S. 705, 722–23 (1989) (Scalia, J., dissenting) (referring to the mailing requirement as a "jurisdictional hook").

170 Moohr, *supra* note 22.

171 *See* United States v. Frost, 125 F.3d 346, 354 (1997) ("mailings may be innocent or

The Supreme Court has recently stepped in to define the reach of "scheme to defraud." In *Neder*, the Supreme Court went back to common-law fraud and held that materiality is required under mail fraud, even though over 100 years earlier the Supreme Court had declined to follow common-law fraud in *Durland*.[172] The Court restricted an ever expanding definition of property in *Cleveland* by deciding government permits and licenses do not qualify as property.[173] Both of these cases illustrate the Supreme Court's "continuing dissatisfaction with the Government's seemingly boundless view of the [mail fraud] statute and provide considerable ammunition for defense attorneys."[174]

The Supreme Court needs to speak once again on the issue of the honest services doctrine. Lower courts have taken the initiative by limiting the scheme to defraud element by curtailing the reach of the doctrine. Restraining the statute in the area of honest services may serve the greatest good since there are no clear definitions in this area of the law. The control of corruption is achieved through vague, undefined legislation that gives enormous discretion to prosecutors.[175]

Congress has failed to define the limits of sections 1341 and 1346. Neither statute gives proper notice of what constitutes a violation. When the Supreme Court attempted to eliminate the honest services doctrine, Congress immediately reacted with new legislation. Rather than eliminating the honest services doctrine, the Supreme Court needs to define the parameters of the doctrine, just as it has provided guidance in *Neder* and *Cleveland*. Within the private sector honest services cases, the Court should adopt the approach of many circuits requiring a finding of a fiduciary duty owed by the defendant. For cases involving public officials, there should be a requirement of a violation of either a state or federal law. These restrictions would give notice as to what violates the statute and would prevent the federal government from creating its own definition of what constitutes good behavior. The lower courts have laid the groundwork for limiting the statute and the Supreme Court must again speak on the issue.

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even legally necessary").

172 Neder v. United States, 527 U.S. 1, 25 (1999).

173 Cleveland v. United States, 531 U.S. 12, 15 (2000).

174 Mogin, *supra* note 2, at 13.

175 *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 156 (1994) (questioning whether vague, undefined federal legislation giving enormous discretion to prosecutors is the appropriate way to control political corruption).